

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SHEILA GRAY,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 02-591-SLR
)	
JO ANNE BARNHART,)	
)	
Defendant.)	

MEMORANDUM ORDER

I. INTRODUCTION

Plaintiff Sheila Gray filed this action against Jo Anne Barnhart, the Commissioner of Social Security ("Commissioner"), on June 26, 2002, seeking review of the July 26, 2001 decision of the administrative law judge ("ALJ"), which denied her application for disability insurance benefits under Title II of the Social Security Act ("Act"), 42 U.S.C. §§ 401-433. (D.I. 2) Before the court are the parties' cross-motions for summary judgment. (D.I. 16, 19) For the reasons that follow, the court denies the motions for summary judgment and remands the case for further proceedings.

II. BACKGROUND

Plaintiff filed a claim for Social Security Disability Insurance on December 3, 1996. (D.I. 13 at 15) Her claim was denied both initially and upon reconsideration. On July 15, 1998, plaintiff had a hearing before an ALJ, who issued an

unfavorable decision on December 21, 1998. The Appeals Council reviewed her appeal and found that the ALJ's finding that plaintiff's work activity between May 1996 and June 1998 was an "unsuccessful work attempt" was not supported by substantial evidence. The Appeals Council vacated the decision and remanded with instructions to consider plaintiff's work activity as well as the reports from treating physicians. (D.I. 13 at 34-37)

A second hearing was conducted by a different ALJ on June 21, 2001. (Id. at 333-343) At that hearing, plaintiff's attorney orally amended the onset date of disability to a closed period of time from December 19, 1995 to November 1997. (Id. at 335) Plaintiff and a vocational expert testified at the hearing.

On July 26, 2001, the ALJ issued an unfavorable decision to plaintiff, finding that she was not disabled because she had engaged in substantial gainful activity during the period at issue and because she did not meet the Act's 12 month duration requirement. (Id. at 17) On April 19, 2002, the Appeals Council affirmed the ALJ's decision. (Id. at 7)

III. STANDARD OF REVIEW

"The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, [are] conclusive," and the court will set aside the Commissioner's denial of plaintiff's claim only if it is "unsupported by substantial evidence." 42 U.S.C. § 405(g); 5 U.S.C. § 706(2)(E)

(1999); see Menswear Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986). As the Supreme Court has held,

"[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Accordingly, it "must do more than create a suspicion of the existence of the fact to be established.... It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939)).

The Supreme Court also has embraced this standard as the appropriate standard for determining the availability of summary judgment pursuant to Fed. R. Civ. P. 56:

The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986)

(internal citations omitted). Thus, in the context of judicial

review under § 405(g),

"[a] single piece of evidence will not satisfy the substantiality test if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence. Nor is evidence substantial if it is overwhelmed by other evidence – particularly certain types of evidence (e.g., that offered by treating physicians) – or if it really constitutes not evidence but mere conclusion."

Brewster v. Heckler, 786 F.2d 581, 584 (3d Cir. 1986) (quoting Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983)). Where, for example, the countervailing evidence consists primarily of the claimant's subjective complaints of disabling pain, the Commissioner "must consider the subjective pain and specify his reasons for rejecting these claims and support his conclusion with medical evidence in the record." Mattel v. Bowen, 926 F.2d 240, 245 (3d Cir. 1990).

IV. DISCUSSION

A. Disability Determination Process

"Disability" is defined in the Social Security Act as an inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423 (d) (1) (A). A claimant is considered unable to engage in any substantial gainful activity

only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d)(2)(A). The Commissioner makes this determination based upon a regulation promulgated by the Social Security Administration that sets out a five-step sequential evaluation process. 20 C.F.R. §§ 404.1520, 416.920 (2003). The Third Circuit outlined the process in Plummer v. Apfel, 186 F.3d 422 (3d Cir. 1999).

In order to establish a disability under the Social Security Act, a claimant must demonstrate there is some "medically determinable basis for an impairment that prevents him from engaging in any 'substantial gainful activity' for a statutory twelve-month period." A claimant is considered unable to engage in any substantial activity "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy."

The Social Security Administration has promulgated regulations incorporating a sequential evaluation process for determining whether a claimant is under a disability. In step one, the Commissioner must determine whether the claimant is currently engaging in substantial gainful activity. . . . In step two, the Commissioner must determine whether the claimant is suffering from a severe impairment. . . .

In step three, the Commissioner compares the medical evidence of the claimant's impairment to a list of impairments presumed severe enough to preclude any gainful work. If a claimant does not suffer from a listed impairment or its equivalent, the analysis proceeds to steps four and five. Step four requires the ALJ to consider whether the claimant retains the residual functional capacity to perform her past relevant work. . . .

If the claimant is unable to resume her former occupation, the evaluation moves to the final step. At this stage, the burden of production shifts to the Commissioner, who must demonstrate the claimant is capable of performing other available work in order to deny a claim of disability. The ALJ must show there are other jobs existing in significant numbers in the national economy which the claimant can perform, consistent with her medical impairments, age, education, past work experience, and residual functional capacity. The ALJ must analyze the cumulative effect of all the claimant's impairments in determining whether she is capable of performing work and is not disabled. The ALJ will often seek the assistance of a vocational expert at this fifth step.

Id. at 427-28.

The determination of whether a claimant can perform other work may be based on the administrative rulemaking tables provided in the Social Security Administration regulations ("the grids"). Cf. Jesurum v. Sec'y of Health & Human Servs., 48 F.3d 114, 117 (3rd Cir. 1995) (noting use of the grids for determination of eligibility for supplemental social security income) (citing Heckler v. Campbell, 461 U.S. 458, 468-70 (1983)). In the context of this five-step test, the Commissioner has the burden of demonstrating that the plaintiff is able to

perform other available work. See Bowen, 482 U.S. at 146 n.5. In making this determination, the ALJ must determine the individual's residual functional capacity, age, education, and work experience. See 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(c) (2003). The ALJ then applies the grids to determine if an individual is disabled or not disabled. See 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(d) (2003).

B. Application of the Five-Step Test

In the present case, plaintiff disputes the ALJ's conclusions at step one in the evaluation process. According to the ALJ,

[t]he record clearly shows that the claimant has worked throughout the period at issue and engaged in substantial gainful activity within the meaning of the Social Security Regulations (section 404.1572 et. seq.) The claimant's earnings constitute substantial gainful activity, and there does not exist a period of 12 months in which the claimant was unable to perform substantial gainful activity.

(Id. at 17) The ALJ based this finding on plaintiff's earnings record which reflect earnings in 1996 of \$19,083 and in 1997 of \$19,529. (Id. at 16)

Plaintiff asserts that the ALJ's decision is not supported by substantial evidence because the record was not adequately developed and additional evidence was not considered. (D.I. 18) Specifically, the ALJ did not consider a September 26, 2002 letter from plaintiff's employer, which explained that she received disability benefits, not wages, between January 18, 1995

and July 18, 1997. (D.I. 17) In his supporting letter to the ALJ, plaintiff's counsel wrote:

My client testified that after July 1997, she went back to work at MBNA doing a sedentary job. At the hearing, it was my understanding that the Court gave its approval to the application for benefits during the limited period of time from December 1995 to July 1997. Due to my understanding that my client's claim had been approved for that limited period of time, no further evidence was sent to the Court. After the Court issued it's (sic) Unfavorable Decision on July 26, 2001, I reviewed this case with my client. [She] was able to go back to her former employer, MBNA, to obtain verification that my client was receiving disability benefits between January 18, 1995 and July 18, 1997. I have enclosed a letter from Betsy Sullivan, RN dated August 17, 2001, verifying that my client received both short term and long term disability benefits while employed at MBNA. Although [she] did work for short periods of time between those dates, I submit that those periods must be viewed as unsuccessful work attempts.

(D.I. 17) Plaintiff submitted this letter as well as the work verification in her motion to supplement the record. (D.I. 17) Although counsel indicates that the letter and documentation were sent to the ALJ, neither was included in the record. The court granted this unopposed motion on May 7, 2003.

Defendant contends that the ALJ properly found that plaintiff was not disabled because she had been engaged in substantial gainful activity within 12 months of her alleged disability onset. (D.I. 20) Defendant also maintains that plaintiff has not demonstrated a good cause for not submitting the letter to the ALJ before the hearing decision was issued.

Pursuant to 42 U.S.C. § 405(g), a court may remand the proceedings upon a showing that there is "new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." A court has discretion to remand a case for further evidence or to award benefits. Moore v. Commissioner of the Social Security Administration, 278 F.3d 920, 926 (9th Cir. 2002); Hummel v. Heckler, 736 F.2d 91, 93 (3d Cir. 1984); Podedworny v. Harris, 745 F.2d 210, 221 (3d Cir. 1984). "Although a district court may exercise a restricted review of the Commissioner's findings, it has no fact-finding role in Social Security cases." Grant v. Shalala, 989 F.2d 1332, 1338-39 (3d Cir. 1993).; see e.g. Lloyd v. Barnhart, 2002 WL 31111988 (3d Cir. Sept. 24, 2003). If new evidence is introduced after the close of the administrative proceeding, a court may remand for additional findings only if the new evidence is material and there is good cause for not including that evidence as part of the administrative record. Hummel v. Heckler, 736 F.2d at 93.

Plaintiff's motion to supplement the record indicates that the employer disability benefits information, although sent to the ALJ, was not included in the record. The court finds the letter is material and plaintiff's counsel's unsuccessful attempt to include the letter constitutes good cause for a remand.

V. CONCLUSION

At Wilmington this 5th day of February, 2004, for the reasons stated;

IT IS ORDERED that:

1. Plaintiff's motion for summary judgment (D.I. 16) is **denied**, and defendant's cross motion for summary judgment (D.I. 19) is **denied**.

2. The decision of defendant denying plaintiff disability insurance benefits is **vacated** and **remanded** to defendant for further consideration of plaintiff's disability claim consistent with the court's Memorandum Order.

Sue L. Robinson
United States District Judge